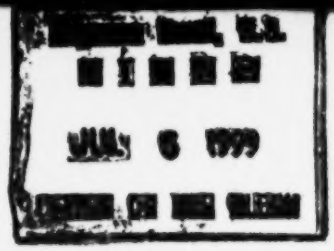

Case No. 98-1923
IN THE SUPREME COURT OF THE UNITED STATES
October Term 1998

JOHN S. FREUND, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0656879

OFFICE OF THE ATTORNEY GENERAL
1655 PALM BEACH LAKES BLVD.
SUITE 300
WEST PALM BEACH, FL 33401-2299
(561) 688-7759

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. THE ELEVENTH CIRCUIT PROPERLY FOUND THAT FREUND DID NOT ESTABLISH THAT TRIAL COUNSEL WAS ACTING UNDER AN ACTUAL CONFLICT OF INTEREST.

II. THE APPLICABILITY OF CUYLER V. SULLIVAN OUTSIDE THE AREA OF CONFLICT OF INTEREST CLAIM INVOLVING JOINT REPRESENTATION WAS NEVER PROPERLY PRESENTED BELOW AND THEREFORE IS NOT A BASIS FOR REVIEW.

III. THE *EN BANC* COURT PROPERLY RELIED UPON PRECEDENT FROM THIS COURT THAT COUNSEL IS NEVER REQUIRED TO PRESENT FALSE EVIDENCE IN AN EFFORT TO EFFECTIVELY REPRESENT HIS CLIENT.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED I

TABLE OF CONTENTS ii

TABLE OF CITATIONS iv

OPINION BELOW 1

CONSTITUTIONAL PROVISIONS 1

JURISDICTION 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

REASONS FOR DENYING THE WRIT 3

QUESTION I 3

THE ELEVENTH CIRCUIT PROPERLY FOUND THAT FREUND DID NOT ESTABLISH THAT TRIAL COUNSEL WAS ACTING UNDER AN ACTUAL CONFLICT OF INTEREST

QUESTION II 14

THE APPLICABILITY OF CUYLER v. SULLIVAN OUTSIDE THE AREA OF CONFLICT OF INTEREST CLAIM

INVOLVING JOINT REPRESENTATION WAS NEVER PROPERLY PRESENTED BELOW AND THEREFORE IS NOT A BASIS FOR REVIEW

QUESTION III 17

THE *EN BANC* COURT PROPERLY RELIED UPON PRECEDENT FROM THIS COURT THAT COUNSEL IS NEVER REQUIRED TO PRESENT FALSE EVIDENCE IN AN EFFORT TO EFFECTIVELY REPRESENT HIS CLIENT

CONCLUSION 20

TABLE OF CITATIONS

Cases	Page(s)
Adams v. Robertson, 520 U.S. ___,137 Led 2d 203 (1997)	14
Beets v. Scott, 65 F.3d 1258 (5th 1995)	14
Card v. Dugger, 911 F.2d 1494, 1503 (11th Cir. 1990)	19
Cave v. State, 476 So.2d 180 (Fla. 1985)	18
Cerro v. United States, 872 F.2d 780 (7th Cir. 1989)	16
Cuyler v. Sullivan, 446 U.S. 335 (1980)	7,10,14,17
Freund v. Butterworth, 165 F.3d. 839 (11th Cir. 1999)	1, 2,7
Freund v. Butterworth, 117 F.3d 1543 (11th Cir. 1997) vacated, 135 F.3d 1419 (11th Cir. 1998)	2,10
Glasser v. United States, 315 U.S. 60, 76-77 (1942)	12
Holloway v. Arkansas, 435 U.S. 475 (1978)	11,12

Illinois v. Gates,
462 U.S. 213 (1983) 13

National Labor Relations
Board v. Pittsburgh Steamship Co.,
340 U.S. 498 (1951) 11,13,19

Nix v. Whiteside,
475 U.S. 157 (1986) 17,19

Oliver v. Wainwright,
782 F.2d 1521, 1524-25 (11th Cir.)
cert. denied, 479 U.S. 914,
107 S.Ct. 313, 93 L.Ed.2d 287 (1986) 7

Porter v. Wainwright,
805 F.2d 930 (11th Cir. 1986)
cert. denied, 482 U.S. 918,
107 S.Ct. 3195, 96 L.Ed.2d 682 (1987) 9

Smith v. White,
815 F.2d 1401 (11th Cir.)
cert. denied, 484 U.S. 863 (1987) 7,15

Strickland v. Washington,
466 U.S. 668 (1980) 9,10,12,14

United States v. Cronic,
446 U.S. 648 (1984) 11,12

United States v. Fahey,
769 F.2d 829 (1st Cir. 1985) 9,10

United States v. Fulton,
5 F.3d 605 (2nd Cir. 1993) 15

Wood v. Georgia,
450 U.S. 261 (1981) 11,13

ADDITIONAL AUTHORITIES:

28 U.S.C. Section 1257 1

Case No. 98-1923
IN THE SUPREME COURT OF THE UNITED STATES
October Term 1998

JOHN S. FREUND, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

OPINION BELOW

The opinion below has been reported as Freund v. Butterworth, 165 F.3d. 839 (11th Cir. 1999) (*en banc*).

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1257. Although this is the appropriate provision, the requirements of same have not been met. See also Rule 10(c).

STATEMENT OF THE CASE

The Eleventh Circuit panel decision was rendered in 1997. Freund v. Butterworth, 117 F.3d 1543 (11th Cir. 1997) *vacated* 135 F.3d 1419 (11th Cir. 1998). The *en banc* decision was entered on January 22, 1999. Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) (*en banc*). Petitioner is now seeking certiorari review in this Court.

STATEMENT OF THE FACTS

Respondent relies on the extensive factual findings that appear in the decision. App. 1-42. Respondent does not accept petitioner's summary of the facts at **petition 4-14.**

REASONS FOR DENYING THE WRIT

QUESTION I

THE ELEVENTH CIRCUIT PROPERLY FOUND THAT FREUND DID NOT ESTABLISH THAT TRIAL COUNSEL WAS ACTING UNDER AN ACTUAL CONFLICT OF INTEREST

In his federal habeas petition, Dr. John Freund asserted that he received ineffective assistance of counsel at trial based on three alleged conflicts of interest. The historical facts which gave rise to the alleged conflicts are detailed in the Eleventh Circuit's *en banc* decision. App. 2-34. A portion of those facts will be recounted here for purposes of this argument.

In June of 1984 petitioner, Dr. John Freund, along with John Trent, was charged with the first degree murder of Ralph Walker. Shortly after being arrested, Freund hired the law firm of Colton, Foley and Duncan to represent him on the charge. Several months prior to trial, Freund filed a motion to sever his case from that of co-defendant Trent. While that motion was pending, Trent also filed a motion to sever the cases.

The trial court held a hearing on the respective motions to sever in September of 1985. At that hearing, Freund argued that severance was necessary because Freund's current attorneys had previously represented Trent on other matters. In the event that Trent decided to testify in his own defense, his former law firm did not want to be in a position of having to cross-examine their former client.

Trent feared that at a joint trial, Freund was going to rely on a statement made to his psychiatrist wherein Freund stated that he stabbed Ralph Walker to death, but he had done so at the direction of Trent. Severance was required because members of his former law firm had previously represented Trent on numerous other matters over the years. In May of 1983 the law firm had represented Trent on charges of possession of diazepam and aggravated assault. However, in May 1984, three months before the murder of Ralph Walker, that representation was terminated. Trent also provided detailed testimony about his prior relationship with his former attorneys. Trent stated that the relationship between he and the firm went beyond that of a professional nature. Trent stated that he confided in Foley and Colton regarding details of his own sexual exploits and drug activities. He also asserted that Foley and Colton participated with Trent in many of those activities.

Trent also stated that on occasions he would provide prostitutes for the law firm as payment for their legal services.

Judge Roger Colton, a former member of the law firm also testified at the severance hearing. He unequivocally denied the allegations involving sexual activities and drug usage. After a brief recess, Freund's attorney Doug Duncan, informed the court in Freund's presence that Freund had been advised of the potential conflict involving the firm's prior representation of Trent and that Freund was free to obtain the services of other counsel at that point. As for the illicit allegations made against the law firm, Freund stated that the firm would fight even harder for him because of Trent's accusations. He therefore wanted the firm to continue to represent him. The trial court granted the motions to sever the trials of Trent and Freund. App.21- 22.

In October of 1985 Trent was tried for the murder of Ralph Walker. Following a hung jury, Trent pled guilty to second degree murder and received a seventeen year sentence. After rejecting a similar plea offer, Freund went to trial. He had presented an insanity defense which was rejected by the jury and he was convicted as charged. App. 23-34.

Following his unsuccessful direct appeal, Freund filed a postconviction motion alleging that he was denied the effective assistance of counsel based on three conflicts of interests. Freund's main contention was that (1) the law firm had previously represented co-defendant Trent in other unrelated matters which therefore created a conflict of interest, (2) the law firm had previously represented state witness Eleanor Mills on an unrelated drug charge, and (3) the law firm was laboring under a personal conflict because of Trent's public allegations against the firm. Freund was granted an evidentiary hearing on these claims. At the hearing, Freund presented two witnesses. The first was Trent's friend, a private investigator Thomas Dick. Dick had done investigative work for the law firm. Dick testified that he was under the impression that former counsel, Roger Colton, had still represented Trent after the murder charges were filed. Dick admitted that his assumption was not based on anything told to him by Colton. App. 35-36.

Freund's next witness was former trial counsel, Doug Duncan. Duncan testified that the potential conflict was discussed with Freund on many occasions throughout the representation, including the day of the severance hearing. Freund insisted that he wanted to waive any potential conflict. Duncan also testified that the only viable defense available for Freund was insanity. That opinion was based on Freund's well documented organic brain damage; Freund's repeated admissions to his lawyers and psychiatrist that he in fact did

stab Ralph Walker to death; and the unwavering testimony of the state's three witnesses inculpating Freund, including one witness who saw Freund stab the victim. App. 36-37. Finally Duncan explained that Trent's allegations against the law firm infuriated him but they had no bearing whatsoever on any of his tactical and strategical decisions during his representation of Freund. App. 37.

Over Freund's objection[1] the state then called Judge Roger Colton as it's first witness. Judge Colton clearly stated that his representation of Trent ended months before the murder of Ralph Walker. Colton also testified that he never had any discussions with Trent about the facts of the murder. Colton again denied all of Trent's accusations against the law firm. App. 38. Freund chose not to cross-examine Colton.

The trial court denied all relief finding that no actual conflicts ever existed. Moreover, the law firm's prior representation of Trent were for matters entirely unrelated to the murder of Ralph Walker. The trial court's ruling was affirmed on appeal.

In 1993 Freund filed a writ of habeas corpus in district court raising the same claims of conflict. Relying on the record of the state evidentiary hearing, the district court denied relief. The court adopted the findings of the magistrate which were as follows: the law firm never engaged in simultaneous representation of Trent and Freund; the firm's prior representation of Trent was not substantially related to the

---

[1] Freund objected to the testimony of Judge Colton. Freund contended that the truth vel non of Trent's accusations of wrongdoing against his former firm were irrelevant in the proceedings.

murder of Ralph Walker; and the insanity defense presented at Freund's trial was the only viable defense available. App. 41.

The circuit court's *en banc* decision affirmed those findings. Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1999) Relying upon this Court's opinion in Cuyler v. Sullivan, 446 U.S. 335 (1980), the court of appeals determined that Freund must establish that an actual conflict existed and that it adversely effected his attorney's performance. App. 43. The court reiterated the long-standing rule of law in the Eleventh Circuit regarding proof of the conflict:

> We hold and reaffirm that Smith articulates this circuit's test for proving an "actual conflict" in the successive representation context. 815 F.2d at 1405-06. We, however, disagree somewhat with each party's interpretation of Smith. Rather, we interpret Smith to mean the following. An "actual conflict" of interest occurs when a lawyer has "inconsistent interests." Smith, 815 F.2d at 1405. In order to prove that an "actual conflict" hindered petitioner's lawyer's performance, petitioner "must make a factual showing of inconsistent interests" or point to "specific instances in the record" to suggest an actual impairment of his or her interests. Smith, 815 F.2d at 1404; Oliver v. Wainwright, 782 F.2d 1521, 1524-25 (11th Cir.) (emphasis and internal quotation marks omitted), cert. denied, 479 U.S. 914, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986). "[G]enerally, it is more difficult to prove that successive representation caused an actual conflict of interest than that simultaneous representation did so." Smith, 815 F.2d at

> 1405. At minimum, petitioner must "show that either (1) counsel's earlier representation of the witness was substantially and particularly related to counsel's later representation of [petitioner], or (2) counsel actually learned particular confidential information during the prior representation of the witness that was relevant to [petitioner's] later case." Smith, 815 F.2d at 1405 (emphasis added). (FN31) Even proof of both substantial relatedness and confidential information, however, may not necessarily be enough to demonstrate "inconsistent interests" in a successive representation case. See Smith, 815 F.2d at 1406. The situation may call for "other proof of inconsistent interests." 815 F.2d at 1406. Overall, the "actual conflict" inquiry is fact-specific, consistent with the petitioner's ultimate burden "to prove that his conviction was unconstitutional." Smith, 815 F.2d at 1406.

App. 44.

Applying these principles, the *en banc* court of appeals found that Freund failed to present evidence in support of his claims of conflict. The firm's prior representation of Trent was for a matter not related to Freund's murder charge. Furthermore, Freund was not able to demonstrate that any confidential information was ever revealed. With respect to the firm's attorney/client relationship with Eleanor Mills, that representation was for an unrelated charge. Moreover, anything Mills may have told to the law firm during that limited consultation had already been disclosed by Mills prior to Freund's' trial. App. 60. And lastly, Trent's allegations of illicit activities against the law firm did not in any way

compromise the firm's loyalty to Freund. To the extent the allegations were harmful, the damage had already been done when Trent made his accusations public at the severance hearing. The hearing had been heavily attended by the media. Freund did not explain what other potential threat or harm could have come to the law firm regarding Trent's public accusations. Consequently, the court concluded that Freund failed to establish a factual basis for any of the alleged conflicts. App. 52-61.

With respect to the second prong of Cuyler, *i.e.*, adverse effect, the court reiterated that rule of law as follows:

> Accordingly, with regard to "adverse effect," the rule of law in this circuit is (and continues to be) the same rule that the panel employed:
>
> To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to "some plausible alternative defense strategy or tactic [that] might have been pursued." United States v. Fahey, 769 F.2d 829, 836 (1st Cir.1985); see also Porter [v. Wainwright, 805 F.2d 930, 939-40 (11th Cir.1986), cert. denied, 482 U.S. 918, 107 S.Ct. 3195, 96 L.Ed.2d 682 (1987)]. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, see Strickland, 466 U.S. at 692, 104 S.Ct. 2052, the petitioner "need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used," rather he only need prove that the alternative "possessed sufficient substance to be a viable alternative." Fahey, 769 F.2d at 836.

> Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, "he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." [Fahey, 769 F.2d at 836].
>
> Freund, 117 F.3d at 1579-80. It bears repeating, however, that "[p]rejudice is presumed only if the defendant demonstrates that ... 'an actual conflict of interest adversely affected his lawyer's performance.' "Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (quoting Cuyler, 446 U.S. at 358, 100 S.Ct. 1708).

App. 47-48.

After applying the Cuyler principles, the *en banc* court concluded that Freund could not establish any of the three elements associated with adverse effect. Based on the facts and circumstances of the case there simply was no other viable defense. In short, conflict-free counsel would have chosen the same defense that was actually presented, *i.e.*, insanity.

Freund also failed to establish that the firm's prior relationship with Eleanor Mills had any adverse effect on his trial. The trial record reveals that trial counsel vigorously cross-examined Mills at trial regarding her relationship with Trent. As already stated, there was no confidential information to protect, as Mills had voluntarily disclosed the substance of her prior conversations with Colton in a pre-trial deposition. Consequently, any "adverse effect" was *de minimus*. App. 67.

Freund petitions this Court to review the *en banc* decision for two reasons. First, Freund alleges that a footnote in the magistrate's report and recommendation, is in conflict with a footnote in United States v. Cronic, 446 U.S. 648 (1984). Second, the *en banc* opinion is in conflict with Holloway v. Arkansas, 435 U.S. 475 (1978) and Wood v. Georgia, 450 U.S. 261 (1981). The state asserts that review should be denied as there is no conflict between precedent from this Court and the *en banc* opinion. Freund is merely dissatisfied with the findings of the *en banc* court of appeals.

First of all, petitioner cannot establish an apparent conflict between the *en banc* decision and precedent from this Court. The alleged conflict appears in a footnote in a magistrate's report. That footnote does not appear anywhere in the *en banc* decision. Freund's assertion of conflict is meritless. National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) (refusing to grant certiorari review based on conflict unless there is a real and embarrassing conflict of opinion and authority rather than a disagreement between the parties).

Second, for purposes of accuracy it must be pointed out that petitioner mischaracterizes the substance of the magistrate's ruling as well as the gravamen of the *en banc's* decision. The magistrate's rejection of Freund's conflict of interest claim was based on his failure to establish any factual support for the conflict. App. 41 The *en banc* opinion affirms that finding. App. 52-61.

Irrespective of that clear holding, Freund takes exception to a footnote in the magistrate's report wherein the court noted that Freund "never expressed any dissatisfaction with his counsel." **Petition at 16.** App. 150 n.5. Freund contends that the magistrate was precluded from relying on

Freund's failure to ever raise an objection to his counsel's performance before the trial court. See Cronic,466 U.S. at 657 n.21. However as already stated, the rejection of Freund's conflict issue was based on his failure to present any evidence of same at the evidentiary hearing and not because he failed to apprise the trial court of the problem.

Furthermore, Freund's reliance on Cronic to establish certiorari review is of no moment. The issue in Cronic did not involve an allegation of conflict of interest. Rather, it stands for the proposition that under Strickland v. Washington, 466 U.S. 668 (1980), a defendant must point to specific trial errors by counsel in order to obtain relief for a claim of ineffective assistance of counsel. This Court stated that a client's assessment of his attorney's performance is irrelevant in the legal assessment of counsel's constitutional duty to provide adequate representation. Cronic, 466 U.S. at 657 n.21. That is not the context in which the magistrate's finding was made in this case.

The magistrate noted that Freund was present at the motion to sever, he was advised of the potential conflict, and he was told that he could obtain different counsel. Once Freund's motion to sever was granted, he never expressed any objection to the firm's continued representation. The magistrate's observations regarding Freund's failure to bring his concerns to the attention of the trial court were proper. Before a trial court is required to inquire into a conflict of interest based on joint representation, the defendant must specifically object to that representation. See Holloway v. Arkansas, 435 U.S. 475, 487-489 (1978) (affirming rule that trial court required to inquire about conflict stemming from joint representation upon clear objection by defendant); Glasser v. United States, 315 U.S. 60, 76-77 (1942) (refusing to reverse conviction of co-defendant based on conflict since co-defendant did not raise

challenge to joint representation). As noted Freund failed to do that.

In summation, the rejection of Freund's habeas petition was based on his failure to present any factual support for his claims at the evidentiary hearing. The magistrate's observation regarding Freund's failure to apprise the court of the conflict was therefore not dispositive of the case. Review is therefore not warranted. National Labor Relations Board, supra.

Freund also alleges that the record in the instant case does not adequately demonstrate that there was a proper waiver of any conflict of interest. This *en banc* decision therefore conflicts with Holloway and Wood v. Georgia, 450 U.S. 261 (1981). Freund's argument is frivolous as the *en banc* court explicitly refused to address the issue of waiver. The court noted that since there was no evidence to establish that any conflict existed, there certainly was no need to discuss any potential waiver of the non-existent conflict. App. 68 n. 39. Freund fails to explain why review would still be warranted given that the issue was never addressed by the court. Illinois v. Gates, 462 U.S. 213 (1983) (reaffirming rule that appellate jurisdiction must fail if federal question does not appear on the record).

QUESTION II

THE APPLICABILITY OF CUYLER v. SULLIVAN OUTSIDE THE AREA OF CONFLICT OF INTEREST CLAIM INVOLVING JOINT REPRESENTATION WAS NEVER PROPERLY PRESENTED BELOW AND THEREFORE IS NOT A BASIS FOR REVIEW

Freund next argues that certiorari review is warranted in the instant case for two separate reasons. First Freund contends that this Court must examine the scope of Cuyler v. Sullivan, 446 U.S. 335 (1980), and its applicability to cases outside the area of simultaneous representations. This issue is not properly before this Court for the following reason.

In its supplemental brief, the state had suggested that the *en banc* court adopt the *en banc* opinion of Beets v. Scott, 65 F.3d 1258 (5th 1995). Therein the Fifth Circuit determined that the "adverse affect" prong of Cuyler should only apply to cases involving simultaneous multiple representations. In all other "conflict" cases, the prejudice standard articulated in Strickland v. Washington, 466 U.S. 668 (1980), should be applied. Beets, 65 F.3d at 1267. The *en banc* court declined to address the state's argument since it was never raised before the district court, the panel, nor was it a basis for the state's rehearing *en banc*. App.47. Given that the issue was never properly presented to the *en banc* court, and the court explicitly stated that resolution of this point was not essential in this case, Freund has failed to demonstrate that certiorari review is warranted. Cf. Adams v. Robertson, 520 U.S. __, 137 Led 2d 203 (1997) (refusing to accept jurisdiction where issue not addressed by court below).

The second argument posed by Freund to justify review is that the *en banc* opinion incorrectly relied upon Smith v. White, 815 F.2d 1401 (11th Cir.), *cert. denied*, 484 U.S. 863 (1987), in it's rejection of the alleged conflict based on the Trent's personal accusations levied against the law firm. Freund claims that the issue should have been addressed under the more appropriate holding of United States v. Fulton, 5 F.3d 605 (2nd Cir. 1993). **Petition at 24.** Freund is incorrect as the *en banc* court did not rely on Smith for it's determination of this issue. Moreover Fulton, is not applicable under the facts of this case.

The rule of law in Smith is applicable for those alleged conflicts arising from either successive or simultaneous representations. Nothing in that holding even suggests that it is applicable to the alleged conflict involving personal allegations of wrongdoing by the firm. See Smith, 815 F.2d at 1405. Consequently, in rejecting this claim the *en banc* opinion did not rely on Smith when it rejected this alleged conflict. App. 52-61. The claim was rejected because Freund simply could not establish what conflict arose from the public allegations. The allegations which gave rise to the alleged conflict came to light in the following manner. Trent filed a motion to sever his trial from that of co-defendant Dr. Freund. At the hearing, Trent testified about his long-standing relationship with his former law firm. He testified that not only were Foley and Colton his attorneys, they were also his friends. It was in that context that Trent went on to allege in very general terms that Foley and Colton attended various sex parties and participated in sexual activities with Trent. Colton also testified at that severance hearing and denied the allegations. As noted by the *en banc* opinion, the allegations were well publicized in the media. App. 60-61.

At the evidentiary hearing, Duncan testified that he and Colton were shocked, angry, and appalled at the allegations. Over Freund's objection, Colton also testified and again denied the allegations. Freund did not cross-examine Colton about this issue. App. 60-61. The *en banc* opinion logically notes that once the allegations were made public in September of 1985, the damage was completed. Freund has never presented any evidence to establish what further harm could come to the law firm. There simply was no conflict. Repetition of the lurid accusations does not establish conflict. Cerro v. United States, 872 F.2d 780 (7th Cir. 1989) (refusing to find conflict based on attorney's fear that potential wrong doing will be revealed when such information already made public).

Freund's reliance on Fulton is misplaced. Therein the Court held that in order to establish actual conflict arising from allegations of criminal conduct on the part of the defense attorney, the alleged conduct be related to the charges for which the defendant is on trial. Fulton, 5 F.3d. at 611. Obviously Freund has not and cannot make that showing. Trent's lurid allegations, to the extent they could be considered criminal conduct, involved generalized statements regarding the alleged sexual proclivities and drug usage of Foley and Colton. Freund refused to offer proof of the allegations or demonstrate what relevancy they had to the murder of Ralph Walker. Consequently Freund's reliance on Fulton is of no moment. There is no conflict present that would warrant review by this Court.

QUESTION III

THE *EN BANC* COURT PROPERLY RELIED UPON PRECEDENT FROM THIS COURT THAT COUNSEL IS NEVER REQUIRED TO PRESENT FALSE EVIDENCE IN AN EFFORT TO EFFECTIVELY REPRESENT HIS CLIENT

Freund claims that certiorari review is necessary because the *en banc* court improperly relied upon this Court's opinion in Nix v. Whiteside, 475 U.S. 157 (1986). Freund specifically argues that counsel was never called upon to present perjured testimony, consequently, Nix does not apply in the instant case. Freund mischaracterizes both the main thrust of the *en banc* opinion as well as the record.

In concluding that Freund had not established "adverse effect"under Cuyler v. Sullivan, 446 U.S. 335 (1980), the *en banc* court found that former counsel pursued the only viable theory available, *i.e.*, insanity. App. 62-64. The cornerstone of the defense actually presented was that Freund was under the domination of Trent and he (Freund) stabbed Walker because he was ordered to do so by Trent. Trent was the mastermind and ring leader of all of the events that evening including the plan to kill Walker. He argued that Trent was responsible for what happened and that Freund and Walker were both victims.

In rejecting Freund's claim that counsel's performance had an adverse effect on the trial, the *en banc* court found that counsel did present a blame-shifting defense against their former client Trent. The defense was in no way exculpatory of Trent or even remotely consistent with his interests. The *en banc* court noted that Trent's participation in the murder as presented at Freund's trial would have subjected Trent to a

capital conviction for felony murder. See Cave v. State, 476 So.2d 180 (Fla. 1985) (finding non-triggerman's participation in crime including that murder weapon, get-away car, and decision to murder victim all belonged to defendant justified murder conviction and sentence of death). Freund does not offer any evidence to the contrary. App.65.

At the evidentiary hearing, Duncan testified that he began investigating an insanity defense early on because of Freund's well documented organic brain damage as well as Freund's consistent statements that he did in fact stab Ralph Walker. Physical evidence supported the defense and three doctors provided corroborative testimony. Besides uncovering evidence related to Freund's organic brain damage, Duncan also deposed the state's witnesses, examined their police statements, observed their testimony at Trent's trial, and investigated their background and criminal history. At no time did any of the witnesses alter their testimony.

Duncan tailored his cross-examination of the witnesses consistent to the insanity defense and to the theory that Trent was a major participant in the crimes. Duncan elicited testimony from the witnesses concerning their criminal backgrounds and strong ties to Trent in an effort to consistently demonstrate Trent's control over everyone that evening. The record clearly establishes that former counsel did vigorously cross-examine the state's witnesses and did force the state to establish Freund's guilt beyond a reasonable doubt.

On cross-examination Duncan was questioned about why he did not pursue an affirmative defense of alibi. He recounted that there simply was no evidence to establish it. No one including Freund ever told him that he was anywhere else but at Trent's apartment that evening. Moreover, Freund had consistently admitted to his lawyers and psychiatrist that he did

in fact stab Walker. Freund has never elicited testimony from Duncan or Foley that there was any reason to disbelieve his confession. In light of this, Duncan stated that he could not ethically present an affirmative alibi defense which he knew to be false. Consequently, to the extent that Freund argued below that counsel should have presented an affirmative defense that he knew was false, the *en banc* court's reliance on Nix was proper. Card v. Dugger, 911 F.2d 1494, 1503 (11th Cir. 1990) (quoting Nix v. Whiteside, 475 U.S. 157 168 (1986), "an attorney's ethical duty to advance the interest of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct." The *en banc* court properly concluded that no other defense existed and counsel is never required to present false testimony.

Freund has failed to point to any conflict between precedent from this Court and the *en banc* opinion. Review must be denied. National Labor Relations Board v. Pittsburgh Steamship Co., 340 U.S. 498 (1951) (refusing to grant certiorari review based on conflict unless there is a real and embarrassing conflict of opinion and authority rather than a disagreement between the parties).

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CELIA A. TERENZIO
Assistant Attorney General
Florida Bar No. 0656879

OFFICE OF THE ATTORNEY GENERAL
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

COUNSEL FOR RESPONDENT